(19) (18)

No. 86-939 and 86-941

In The
Supreme Court of the United States
October Term, 1986

ETSI PIPELINE PROJECT,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS STATES OF MISSOURI, IOWA AND NEBRASKA

STATE OF MISSOURI

WILLIAM L. WEBSTER
Attorney General

CURTIS F. THOMPSON*
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Tel. (314) 751-3321

STATE OF IOWA

THOMAS J. MILLER
Attorney General

ELIZABETH M. OSENBAUGH*
Deputy Attorney General

ELIZA OVROM
Assistant Attorney General
Hoover State Office Bldg.
Des Moines, IA 50319
Tel. (515) 281-5351

STATE OF NEBRASKA

ROBERT M. SPIRE
Attorney General

LE ROY W. SIEVERS*
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
Tel. (402) 471-2682

* Counsel of Record

QUESTION PRESENTED

Whether the Secretary of the Interior may market water from multipurpose storage in Army reservoirs on the Missouri River without regard to the express provisions of section 6 of the Flood Control Act of 1944, which confer that authority on the Secretary of the Army and which protect existing uses of that water.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

No. 86-939 and 86-941

In The

Supreme Court of the United States

October Term, 1986

ETSI PIPELINE PROJECT,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS STATES OF MISSOURI, IOWA AND NEBRASKA

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (Pet. App. 1a-44a)[1] affirming the District Court is re-

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in this case by ETSI Pipeline Project (No. 86-939); "J.A." is the Joint Appendix filed by the parties; "State App." are documents attached to this brief; "A.R." refers to administrative record documents on file with the Clerk of the District Court in Lincoln, Nebraska; "C.A. App." is the Court of Appeals appendix; "ETSI App." is the appendix to ETSI's brief on the merits.

ported at 787 F.2d 270. The District Court opinion (Pet. App. 45a-72a) is reported at 586 F.Supp. 1268.

STATUTES INVOLVED

Sections 1 through 9 and the introduction of section 10 of the Flood Control Act of 1944, ch. 665, 58 Stat. 887, are set out in the Addendum to this brief.

STATEMENT

This case arises because the Department of Interior's Bureau of Reclamation in 1982 granted a water service contract to ETSI to withdraw annually 20,000 acre-feet of Missouri River water from Lake Oahe, an Army Corps of Engineers reservoir on the Missouri River located in South and North Dakota, to use as a transportation medium in a coal slurry pipeline. J.A. 224.

In approving the ETSI contract, Interior justified it as part of a previously unannounced industrial water marketing program from the six Army reservoirs on the Missouri River. (This program, it said, was "currently limited to" one million acre-feet of water annually). J.A. 219. The Department of the Army operates these reservoirs under the Flood Control Act of 1944. Interior claimed this power under the Act despite the fact that section 6 of that Act authorizes the Secretary of the Army, not Interior, to execute contracts for industrial use of surplus water at any reservoir under the control of the Secretary of the Army.

The States of Missouri, Iowa and Nebraska, and their citizens use Missouri River water for drinking water, irrigation, recreation, navigation, hydroelectric power production, water supply, and waste disposal. *See* Second Amended Complaint, ¶s 8-10. Missouri River levels are also critical to maintenance of adjacent fish and wildlife habitat and ground water levels. *Id.*

Concerned that the Department of the Interior's actions would result in substantial diversion of Missouri River waters to large industrial users without regard to federal laws governing industrial use of those waters and without adequate environmental analysis, the States filed suit in August, 1982.

On May 3, 1984, the United States District Court for Nebraska, the Honorable Warren J. Urbom, Chief Judge, enjoined performance of the ETSI water service contract on the ground that the Secretary of the Interior lacked authority to permit industrial use of Army reservoir water. The District Court concluded that this authority was conferred on the Secretary of the Army under section 6 of the Flood Control Act. The Secretary of the Interior could not rely on reclamation law to assert contrary authority under section 9(c) of the Act as Lake Oahe was not a "reclamation project to be undertaken by the Secretary of the Interior" under the Act. Pet. App. 45a-70a.

The Court of Appeals for the Eighth Circuit affirmed. The Court held that the clear meaning of the Act as well as its legislative history established that Congress deliberately conferred this authority on the Secretary of the Army rather than on the Secretary of the Interior. The Court rejected the argument that Interior should have

plenary power to convert "irrigation storage" to industrial use. Pet. App. 1a, 17a-35a.

History of Lake Oahe

Congress divided the proposed Missouri River Basin projects in the "Pick-Sloan Plan"[2] between Army and Interior according to the dominant purpose of the projects. Pet. App. 50a. Projects whose dominant purpose was flood control would be built and operated by the Corps. Projects whose dominant purpose was irrigation would be built and operated by the Bureau.[3] Congress gave separate authority and appropriations to each agency to begin construction of projects assigned to it.[4] Congress unequiv-

---

[2]The "Pick-Sloan Plan" actually consists of three documents, the Pick or Army Plan contained in H.R. Doc. 475, 78th Cong., 2d Sess.; the Sloan or Interior Plan in S. Doc. 191, 78th Cong., 2d Sess.; and S. Doc. 247, 78th Cong., 2d Sess.

[3]Representative Whittington, the principal manager of the bill in the House, commented that "[t]he conference agreement contains the reconciliation of the views as between these two agencies of the Government and provides for the construction of the works that are predominantly flood control by the Chief of Engineers and for the construction of the works that are predominantly reclamation by the Bureau of Reclamation." 90 Cong. Rec. 9281 (1944).

[4]As Representative Curtis commented:

> There is a definite need for both the Army engineers and their program of flood control and the work of the Bureau of Reclamation and their program of irrigation. This legislation authorizes both programs and gives to each agency a $200,000,000 authorization.

90 Cong. Rec. 9284 (1944).

ocally endorsed this division of mission in its debates,[5] and the Act clearly adopts it.

Both agencies agreed that the Missouri River main stem reservoirs, including Oahe, should be constructed, operated, and maintained by the Corps of Engineers "because of their peculiarly close relationship with flood control and navigation below Sioux City . . ." H.R. Doc. 475, p. 6 (Comments of the Bureau of Reclamation). *See also* S. Doc. 191, pp. 4, 7; S. Doc. 247, p. 3. H.R. Doc. 475, pp. 3-4 (1944). Pet. App. 57a, 59a. Interior sought to build and construct more reservoirs on the tributaries.[6]

---

[5]*E.g.*, Remarks of Senator Overton, Senate manager of the Flood Control Act, 90 Cong. Rec. 8245 (1944) ("I believe that flood control should be under the Board of Army Engineers for Rivers and Harbors. I believe that irrigation projects and other related projects should be under the control of the Bureau of Reclamation . . . ."); Remarks of Senator Overton, 90 Cong. Rec. 8625 ("I endorse the statement made by the President of the United States. He undertakes to show a line of demarcation between reservoirs for reclamation and irrigation purposes and those built for flood control and navigation. One category is to be built by the Bureau of Reclamation, and the other by the Army Engineers."); Remarks of Rep. Whittington, 90 Cong. Rec. 9282, primary House manager of the Flood Control Act ("Section 9(a), authorizing the Missouri River Basin improvement, provides . . . that the works that are predominantly flood control shall be constructed by the Chief of Engineers, and the works that are predominantly reclamation shall be constructed by the Bureau of Reclamation.").

[6]The Sloan Plan states:

> The major part of the run-off originates in the mountain headwaters, and storage capacities in such localities are just as effective as capacity in the main stream in the Dakotas. For irrigation, for maximum power production, and for distributed flood control, many reservoirs are, therefore, provided in the headwaters area. There need be retained in the Dakota section only the

(Continued on following page)

Although Interior's plan provided for a larger reservoir at Oahe, Interior actually proposed ten million acre-feet less capacity in the main stem reservoirs than Army did and made irrigation a primary purpose of Fort Peck, a reservoir previously constructed for navigation purposes.[7] S. Doc. 191, p. 121. A primary purpose of Lake Oahe was to provide adequate waters for navigation downstream to compensate for the water to be diverted from Fort Peck. *Id.* The documents reconciling the two agencies' engineering reports approved Interior's proposals for extensive reclamation reservoirs on the tributaries but also provided the expansive capacity the Corps wanted on the main stem.[8] S. Doc. 247.

The Army Corps of Engineers concededly built Oahe and has always operated and maintained that reservoir. Interior has always recognized Army's control over Oahe. Pet. App. 55a. The ETSI contract itself states that "The

---

(Continued from previous page)

> necessary capacity to control and regulate the residual flows that are not controlled upstream.

S. Doc. 191 at 122. The Sloan Plan thus provided for reclamation reservoirs and irrigation units providing over thirteen million acre-feet of additional storage in the Yellowstone Basin, on the Missouri River tributaries above Sioux City, and in the Niobrara, Platte, and Kansas River Basins. S. Doc. 191, p. 94-95, 120-121.

[7]The 1944 Flood Control Act was not, as *amici* assert, p. 11, Congress' first consideration of Corps projects in the west. Congress had already authorized the Fort Peck Reservoir and a six-foot navigational channel as part of its comprehensive plan for the Missouri River for navigation and flood control purposes in the Flood Control Act of 1938, P.L. 761, 75th Cong.

[8]The Corps has built and is operating 20 Pick-Sloan Missouri Basin program reservoir projects, and the Bureau has built and is operating 33 such projects. States' App. 23a.

United States, through its Corps of Engineers, has constructed and is operating the Oahe Dam and Reservoir . . . pursuant to Section 9 of the Flood Control Act of December 22, 1944." J.A. 225.

Interior currently exercises no functions at Oahe reservoir. Although Interior's Bureau of Reclamation once marketed power generated at the Army power plants, that authority was transferred to the Department of Energy in 1977. 42 U.S.C. § 7152(a)(1)(E). The Bureau's primary function is irrigation, yet it has executed no irrigation contracts at Oahe[9] and the only Congressionally-authorized irrigation work at Oahe has been effectively deauthorized.[10] Pet. App. 20a. Significantly, there is no specific storage space assigned to irrigation at Oahe. Instead, all water is in multiple-use storage, where it is used for all authorized project purposes, including irrigation, power generation, and navigation. Pet. App. 20a, 63a.

The Memorandum of Understanding

In late 1973, during the "energy crisis," the Army and Interior Departments hastily set up an "Ad Hoc Committee on Water Marketing from the Mainstem Reservoirs" to consider use of reservoir water for possible synthetic fuel projects. The agencies initially agreed that the Secretary of the Army would be the lead agency, but

---

[9]128 Cong. Rec. 16607, Table I-Status, n.3. Some riparian irrigators and other irrigators within South Dakota draw water from Lake Oahe pursuant to South Dakota water permits but not contracts with the Bureau of Reclamation.

[10]Pub. L. 97-273, 96 Stat. 1181 (1982).

"subsequent divergence of views" left the choice of marketing agency unresolved. A.R. 900,055; C.A. App. 161.[11]

In December 1974 the Army Acting General Counsel concluded that joint marketing through a temporary memorandum of understanding would be acceptable. J.A. 129. But the Acting General Counsel added that "notwithstanding my opinion that there is *arguable* authority for the Secretaries of the Army and Interior, *acting jointly,* to market water from the main stem reservoirs for this purpose, I *strongly advise that legislation* establishing a systematic marketing system *be sought.*" He further stated without qualification that "*the Secretary of the Interior may not market the water* from these [main-

---

[11]The Chairman of the Missouri River Basin Commission (MRBC) was chairman of the Ad Hoc Committee, but it was not an MRBC undertaking. The state subcommittee concluded that definitive decisions on many of the issues presented by the proposed water marketing could not be made on the information available and in such a short time period. Summary of the Missouri River Basin Water Marketing Question, submitted by the Honorable Thomas L. Judge, Governor of Montana, Missouri River Basin Industrial Water Marketing, Hearing before the Subcommittee on Energy Research and Water Resources of the Senate Committee on Interior and Insular Affairs, 94th Cong., 1st Sess. 47 (1975) [hereinafter 1975 Hearings]. The states subcommittee position paper sought referral of the water marketing questions to the MRBC. *Id.* Several of the Basin States questioned the authority of the federal agencies to convert major quantities of water for industrial use. *Id.* The Governor of the State of South Dakota complained in 1975 that the ad hoc committee did not adequately consider the wishes of the States. 1975 Hearings at 13.

Interior cites the Ad Hoc Committee report as an example of its "careful study" prior to execution of the MOU. (Fed. Br., p. 16). Between December 19, 1973, and January 3, 1974, a committee of federal employees prepared the report on Missouri River water availability for energy use. A.R. 900,336; Memoran-

(Continued on following page)

stem] reservoirs *independently.*" J.A. 135n*.[12] (emphasis added).

The Interior Solicitor meanwhile concluded that his agency did have authority to market the water for industrial use. J.A. 120. His unpublished memorandum, which was sharply criticized by both courts below, was the sole basis for the Department's assertion of this authority. Pet. App. 69a.

On February 24, 1975, the Army and Interior Secretaries signed a memorandum of understanding (MOU) providing for a limited two-year joint marketing plan. The Secretary of the Army specifically advised the Secretary of the Interior of his concern that statutory authority for the water marketing was unclear; he described the MOU as a temporary solution pending Congressional action. J.A. 142.

The MOU provided that Interior would execute the contracts on its own behalf and "as agent for Army." J.A. 136. The MOU required Army approval of all contract terms and provided that Army was to "retain all operational and managerial control" over the reservoirs. *Id.* The Secretary of the Army (and later also, the Sec-

---

(Continued from previous page)

dum to Technical Group Leaders and Members from John Neuberger, Dec. 19, 1973. The Department of the Interior made a subsequent determination of water availability for the Memorandum of Understanding. That determination is also challenged by the plaintiffs. Second Amended Complaint, ¶ 64.

[12]The Army Acting General Counsel also stated that he concurred with the General Counsel for the Chief of Engineers that the main stem reservoir water was not surplus water available for conversion to industrial use because practically all of the water was being used for generation of hydropower, an authorized project purpose. J.A. 133-35.

(Continued on following page)

retary of Energy) had to agree that the proposed energy use was a beneficial use taking precedence over hydropower generation. *Id.* Army, not Interior, continued to contract for municipal use of those reservoirs.[13] A.R. 930,315, C.A. App. 357.

The temporary MOU was sharply criticized during Senate subcommittee hearings.[14] Several Missouri River Basin States criticized the MOU.[15] The agencies testified that the MOU was an interim measure. 1975 Hearings at 23, 30-31. Two water service contracts with industrial users were executed pursuant to the MOU.[16] J.A. 145-146.

(Continued from previous page)

However, the Army General Counsel has now opined that the Secretary of the Army may make a reasoned accommodation between hydropower generation and industrial use and may permit industrial use of the main stem reservoirs despite loss of hydropower. States' App. 12a, cited in Fed. Br. p. 39, n.58. See pp. 36-37, *infra*.

[13]Proposed municipal water use which would share the ETSI aqueduct was to be by contract with Army, not Interior. Corps of Engineers Environmental Assessment, C.A. App. 361.

The Reclamation Projects Act of 1939, 43 U.S.C. § 485h(c), authorizes contracts "to furnish water for municipal water supply or miscellaneous purposes at reclamation projects." Yet Interior did not assert authority over these municipal uses at Oahe.

[14]See, e.g., 1975 Hearings, Part I, pp. 1-2, 42, 50-51; Part II, pp. 298-304.

[15]See, e.g., comments of Nebraska, 1975 Hearings, Part II, p. 302; and of South Dakota, 1975 Hearings, Part I, pp. 13-14.

[16]The ANG contract, although actually executed after termination of the MOU, recites the MOU as authority. J.A. 146. It was therefore presumably executed with Army approval.

A "master contract" with the Montana Department of Natural Resources was also executed in 1976. Br. for Montana as *Amicus Curiae* in support of Petitions for Writ of Certiorari,

(Continued on following page)

Citing its continuing reservations regarding statutory authority, Army refused to further extend the MOU, J.A. 143-44, and the agreement expired on December 31, 1978.

The ETSI Contract

The execution of the ETSI contract in July 1982 was Interior's first assertion of unilateral authority to market main stem reservoir water for industrial use. Pet. App. 11a. That contract permits ETSI to withdraw Oahe Reservoir water for use as a medium to transport coal in a coal slurry pipeline.[17] The contract permits the withdrawal of 20,000 acre-feet[18] per year for forty years and provides a right of renewal.[19] ETSI planned to pump the water 276 miles to Wyoming for injection into the coal slurry pipeline. Pet. App. 7a. The water would then be discharged in Louisiana and Arkansas, the proposed termini of the pipeline; it would not be returned to the Basin.

Interior justified the ETSI water service contract as part of its previously unannounced water marketing pro-

---

(Continued from previous page)

p. 2. No diversions were made under the contract and it expired in 1986. *Id.*

[17]J.A. 225-226, ¶ b. The complaint alleges that a transportation use is not a permitted use under the Flood Control Act, an issue not reached below.

[18]Twenty thousand acre-feet of water is the equivalent of 6.5 billion gallons. This amount of water withdrawn from Oahe "would cause average losses of about 2 mw (megawatts) and 18 million kwh (kilowatt hours) per year." Corps of Engineers Environmental Assessment, A.R. 930,315, C.A. App. 363. The diversion of one million acre-feet of water would reduce hydropower generation on the main stem by five percent. 1975 Hearings at 34.

[19]ETSI also intends to request an additional 30,000 acre-feet. The contract recognizes that ETSI "intends to request an additional water service contract from the United States as plans are developed to utilize the full 50,000 acre-feet of water per year." J.A. 226, ¶ c.

gram.[20] J.A. 212-23. Interior merely cited the Solicitor's 1974 opinion to assert this authority under section 9 (c) of the Flood Control Act and section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c) (53 Stat. 1187). J.A. 216-17; Pet. App. 69a.

Army did not approve the ETSI water service contract.[21] Pet. App. 15a-17a. See pp. 20-21, *infra*.

In August 1982 the States filed this suit challenging the validity of the water service contract and marketing program under the 1944 Flood Control Act, the 1958 Water

---

[20]A 1980 internal departmental memorandum stated that Interior intended to continue water marketing from the main stem reservoirs despite expiration of the MOU. J.A. 148. That memo cited the 1974 Solicitor's opinion as its sole legal authority. The agency could not obtain sufficient internal agreement on major issues to submit a Secretarial Issue Document for Secretarial approval. J.A. 147.

The document approving the ETSI contract states that the MOU procedures were being followed, citing this memo. J.A. 216-217. There is, however, no finding that the Interior, Army, and Energy Departments concluded that the ETSI use was a beneficial use taking precedence over hydropower generation. *See* J.A. 212. Army did not approve the ETSI contract. Pet. App. 15a-17a. The 1980 memorandum also concludes that a state could not receive more than its costs for permitting use of a federal reservoir, J.A. 150, but the agreement between South Dakota, the South Dakota Conservancy District, and ETSI provided for substantial payments by ETSI for its state permit. J.A. 163-168.

[21]The Missouri River Division of the Army Corps of Engineers granted ETSI permits for construction of the intake structure but specifically refused to consider any arguments concerning authority for Interior's grant of a water service contract. *See* p. 21 *infra*. Pet. App. 16a, n.8.

The plaintiff States have also challenged the actions of the Army Corps of Engineers in granting these construction permits without regard to the validity of the water service contract.

Supply Act, 43 U.S.C. § 390b, and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* The States also contended that the agency violated the National Environmental Policy Act, 42 U.S.C. § 701 *et seq.*

Suit was also filed by the Kansas City Southern Railroad, the Sierra Club, and three chapters of the Farmers Educational and Cooperative Union of America. J.A. 42. These actions were consolidated for trial. J.A. 7, Docket No. 72.

The District Court Decision

The District Court, ruling on cross-motions for partial summary judgment, held that the ETSI contract was *ultra vires.* Because the District Court concluded that reclamation law did not apply to industrial marketing at Oahe, it did not reach other issues including, *inter alia,* whether the Secretary of the Interior could authorize the export of water out of the Missouri River Basin, execute a contract for transportation use, or implement a massive industrial water marketing program for industrial use without Congressional approval.

Cancellation of the Pipeline Project

In July 1984, ETSI announced its termination of the pipeline project and cancelled its state water permit. Mootness Exh. 1; Mootness Exh. 10, J.A. 257. Suggestions of mootness were referred to the District Court Fed. Pet. Reply Br., p. 3a. The Court of Appeals affirmed the District Court's conclusion that the appeals were not moot because ETSI and Interior had not taken action to ter-

minate their contract and because the ETSI contract was part of a water marketing program.[22] Order of April 22, 1985, by Gibson, J., and Bright, J., with Fagg, J., dissenting. Fed. Pet. Reply Br. at 1a.

Four days before oral argument in the Court of Appeals, the State of South Dakota filed a motion for leave to file an original action in this Court. *State of South Dakota v. Nebraska* (No. 103 Original). The essence of that motion was that this suit is in reality a suit between the States. This argument had been considered and rejected by the Court of Appeals. Pet. App. 15a, n.7. This Court granted North Dakota's motion to intervene but denied without prejudice the motion for leave to file complaint. However, in September 1986, the State of South Dakota renewed its motion for leave to file. That motion remains pending.

Subsequent Army Interpretation

On the same day that the Court of Appeals affirmed the District Court decision, the Army General Counsel issued an opinion broadening the definition of "surplus water" available for marketing by Army under section 6 of the Act. Fed. Br., p. 38, n.58. States' App. 12a.

---

[22]The federal defendants and ETSI had in the District Court consistently denied plaintiffs' allegations concerning the existence of the water marketing program. The federal defendants, for example, refused to submit an administrative record for the program, see J.A. 14, Docket No. 152. Shortly before the District Court ruling on summary judgment, ETSI filed a motion in limine on behalf of the defendants seeking exclusion of all evidence concerning impacts of water withdrawals other than ETSI's. J.A. 31, Docket No. 355.

Petitions for Certiorari

This case is now before this Court on petitions for certiorari filed by the federal defendants and by ETSI.

SUMMARY OF ARGUMENT

1. The 1944 Flood Control Act carefully allocates the respective jurisdictions of the Secretary of the Army and the Secretary of the Interior over the projects authorized in the Act. Contrary to defendants' arguments, the Secretary of the Interior's authority at Army reservoirs is not plenary. Rather, the Act defines his authority and also specifies the terms under which industrial use of Army reservoirs may be permitted. Only Congress can modify those provisions.

Section 6 of the Flood Control Act directly addresses industrial marketing authority at any reservoir under the control of the Secretary of the Army. The Secretary of the Interior concedes that Lake Oahe is a reservoir under the control of the Secretary of the Army. Therefore, section 6 authorizes the Secretary of the Army, and not the Secretary of the Interior, to contract for domestic and industrial uses for surplus water at Lake Oahe. The Department of the Interior, nevertheless, unilaterally executed the ETSI contract without approval by the Secretary of the Army.

Interior's execution of the ETSI contract is also inconsistent with Congress' expressed intent to protect existing uses of the water. Section 6 requires that indus-

trial water service contracts shall not adversely affect existing uses of the water. The Secretary of the Interior, by contrast, considers only the impact of the withdrawal on the "irrigation efficiency" of the reservoir under reclamation law.

Congress directly addressed the question by whom and under what conditions this water could be marketed. It is particularly inappropriate to imply any exception to the commands of section 6 because Congress considered, and rejected, proposals which would grant Interior the authority it now asserts. Congress rejected two proposed amendments to section 6 to permit Interior to market water for industrial use at Army reservoirs in certain instances.

Nonetheless the Department of the Interior asserted that it could market Oahe water for industrial use. Its purported basis was section 9(c) of the Flood Control Act, which applies reclamation law only to "reclamation and power developments to be undertaken by the Secretary of the Interior under [the general comprehensive plans for the Basin]." Defendants make no attempt to establish error in the lower courts' holdings that Oahe is not a reclamation development to be undertaken by the Secretary of the Interior under those plans. Instead defendants argue that the agencies and some legislators suggested that Interior regulations should control "irrigation storage" at Army reservoirs. However, Congress enacted section 8 in lieu of the House version which embodied those suggestions. Section 8 provides a procedure for Interior to construct and operate irrigation works and clearly does not authorize the ETSI contract.

2. The defendants frame the issue as whether the Secretary of the Interior may supply "unutilized irrigation water" for industrial use. There is, however, no defined irrigation storage at Oahe. Instead, waters are stored in multiple-use storage where they serve all authorized project purposes, including navigation and hydropower generation as well as irrigation. To call the water "unutilized" is clearly incorrect. Indeed, ETSI and the *amici* contend that section 6 will bar all industrial use on the ground that there is no surplus water because all of the water is now utilized. The Army General Counsel has, however, recently opined that main stem reservoir water may be made available for industrial use under section 6.

3. The Department of the Interior cannot assume jurisdiction in contravention of section 6 without Congressional authorization. The agency's own preference for industrial use or for financial credit cannot override the judgment of Congress. This assumption of legislative power is especially inappropriate here because Congress has repeatedly emphasized the need for Congressional authorization to modify the operation of these reservoirs. The agency has had an adequate opportunity to seek that authorization. Congress is the sole constitutional authority able to "correct" statutes. As a representative body which can re-write statutes to suit its purposes, Congress is best able to frame a remedy. This Court should not ratify Interior's attempt to evade the authority of Congress.

4. Deference would be inappropriate at any rate because Army, not Interior, administers the relevant act. Interior made no attempt to articulate a reasonable basis for its authority to execute the ETSI contract. The sole basis for its position was a 1974 memorandum from its Solicitor which ignored the text of the Act and was directly contrary to the opinion of Army's Acting General Counsel. The decisions below by contrast carefully consider the text, the purpose, and the history of the Act. Those decisions are clearly correct and should be affirmed.

ARGUMENT

I. THE SECRETARY OF THE INTERIOR'S ASSERTION OF INDUSTRIAL MARKETING AUTHORITY AT ARMY RESERVOIRS IS IMPROPER BECAUSE IT IS INCONSISTENT WITH THE LANGUAGE, PURPOSE, AND HISTORY OF THE FLOOD CONTROL ACT.

A. Congress Deliberately Conferred Industrial Marketing Authority on Army, Not Interior, in Section 6 of the Act.

Congress directly addressed the question of authority for industrial water marketing at Army reservoirs constructed under the 1944 Flood Control Act. Section 6, codified at 33 U.S.C. § 708, states:

> That *the Secretary of War is authorized to make contracts* with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, *for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: Provided,* That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be de-

> posited in the Treasury of the United States as miscellaneous receipts.

(emphasis added).

Section 6 clearly provides for Army control of industrial uses at Army reservoirs. As Senator Overton, the manager of the Flood Control Act in the Senate, explained:

> [I]n connection with the sale for domestic and *industrial uses* of surplus water available in any reservoir under the control of the War Department, the committee has recommended an amendment which protects the existing lawful uses of the water. For instance, when a dam is constructed and water is impounded in it and there is nearby a lawful user of that water, we do not want to deprive him of his rights. Therefore, he is permitted to take water from the dam, but, *of course, he does it under the direction of the Secretary of War.*

90 Cong. Rec. 8231 (1944) (emphasis added).

Congress rejected a proposal by Secretary of the Interior Ickes to amend section 6 to grant Interior authority over industrial water marketing at Army reservoirs utilized for irrigation purposes under section 8.[23] Secretary

---

[23]His proposal would have amended section 6 (then section 4) as follows:

> Provided, that the Federal reclamation laws shall govern the disposition for domestic or industrial uses of surplus water from any reservoir utilized for irrigation purposes pursuant to section 6 [enacted as section 8] of this Act.

Flood Control: Hearings on H.R. 4485 Before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess., at 312-13 (1944) [hereinafter H.R. 4485 Senate Hearings].

Ickes recognized that section 6 "does not involve reclamation but covers merely the sale of water for industrial purposes . . ." H.R. 4485 Senate Hearings, pp. 312-313. Ickes argued, however, that the amendment would promote "efficient and economical administration." *Id.* Congress did not enact the proposed amendment.

Congress rejected another amendment which would apply reclamation law to industrial use of all reservoirs west of the 97th meridian.[24] 90 Cong. Rec. 4197. The House manager of the bill, Representative Whittington, opposed the amendment, saying that "the purpose of Section 4 [Section 6 of the Act] *in no way involves reclamation.*"[25] *Id.* On a vote of the House, the amendment was rejected.

Interior cannot claim it executed the ETSI contract pursuant to any delegation of authority from Army. The 1975 MOU was terminated long before the ETSI contract was executed, J.A. 217, and the Court of Appeals specifically found that Army did not participate or join in the

---

[24]That amendment stated:

> *Provided, however,* That, in the case of any reservoir located west of the 97th meridian the right to the use of waters for such purposes shall be established, and the repayment of costs allocated thereto shall be provided for, pursuant to the provisions of the Federal Reclamation laws.

90 Cong. Rec. 4197 (1944).

[25]Representative Whittington also said that section 6, numbered section 4 in the House, was needed so that "the Government" could provide water from Army reservoirs for domestic and industrial use, 90 Cong. Rec. 4197, thus implying that Interior did not have this authority. Pet. App. 66a. Representative Whittington also stated that this would provide similar authority to the Corps in reservoir districts that Interior already had in reclamation districts. 90 Cong. Rec. 4134; Pet. App. 66a.

execution of the ETSI contract. Pet. App. 15a-17a. In approving construction permits for the ETSI intake structure, the District Engineer stated that the validity of that contract was outside the scope of the Corps permit review, J.A. 211, and further stated that the Corps construction permit "would not constitute, or be tantamount to, such a contract." Quoted in Pet. App. p. 16a, n.8. Counsel's statement that Army currently finds Interior's position "acceptable" is simply irrelevant. Fed. Br. at 46. Army expressly eschewed involvement in the ETSI contract, and Interior cannot rely on Army approval here.

Under section 6, industrial water service contracts are limited to surplus water and cannot adversely affect existing lawful uses of the water. Interior, by contrast, considers only whether the proposed diversion will adversely affect the "irrigation efficiency" of the reservoir under the Reclamation Project Act of 1939, § 9(c), 43 U.S.C. § 485h(c).[26]

---

[26]Interior also claims it need consider only those irrigation uses which would be supplied through Interior works described in the original Pick-Sloan plans. *Upper Missouri Region, Bureau of Reclamation Summary of Statements, Letters, and Resolutions Received from Public on Proposed Water Service Contract Between ETSI and the United States*, A.R. 900,287, p. 6. States' App. 21a. The agency here refused to consider impacts on irrigation use in Nebraska on the ground that the Pick-Sloan Plan did not include use of main stem storage for projects in Nebraska. *Id.*

(Continued on following page)

It would be unreasonable to imply authority in section 9(c) to permit industrial marketing in violation of the conditions for industrial water marketing made express in section 6. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929).

B. This Assertion of Authority is Contrary to the Language, Purpose, and History of Section 8 Because it Expands Interior's Scope of Authority in a Manner Congress Expressly Refused to Enact.

Section 8 expressly addresses the circumstances in which reclamation law applies at Army reservoirs capable of use for irrigation. Under section 8 only "*additional works . . .* necessary *for irrigation purposes,*" and not the Army reservoir project itself, are to be constructed, operated, and maintained under the reclamation laws. Specific Congressional authorization is required before con-

---

(Continued from previous page)

See also Environmental Defense Fund v. Morton, 420 F. Supp. 1037, 1044-1045 (D. Mont. 1976), aff'd. in relevant part, *sub nom. Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9 Cir. 1979) (Petitioners cite this case to support their position. (Fed. Br., p. 30, ETSI Br., pp. 21-22). The case involved reclamation reservoirs undertaken by the Secretary of the Interior, and industrial use was a specifically authorized project purpose. The case is not relevant here, and plaintiff States dispute that its conclusions would be correct at Oahe even if this Court concluded that the reclamation laws apply.)

struction of irrigation works.[27] Congress, largely at South Dakota's urging, effectively de-authorized the only irrigation work ever authorized at Oahe.[28]

The Reclamation Reform Act of 1982, § 212(a), 43 U.S.C. § 390*ll*, makes it clear reclamation law will not apply even to irrigation uses of Army reservoirs, absent the existence of project works or specific statutory directive.[29] Pet. App. 30a, n.21. Oahe is specifically listed as

---

[27]Congress inserted this requirement of specific Congressional authorization of irrigation works; it was not contained in the Interior Secretary's proposal. (Compare proposal of Secretary of Interior in H.R. 4485 Senate Hearings, p. 313, with section 8, 58 Stat. 891.)

P.L. 88-442 also requires reauthorization of any works previously authorized in the Missouri River Basin but not constructed before August 14, 1964.

[28]P.L. 97-273, 96 Stat. 1181. In 1978 the South Dakota legislature passed a law calling for a moratorium on further construction of the Oahe irrigation unit. S.D.C.L. § 46-A-1-78. In 1981 South Dakota's Senators and one Representative introduced bills to cancel construction of the Oahe Unit or to deauthorize it. S. 1374 (Sen. Pressler), S. 1553 (Sen. Abdnor), H.R. 4347 (Rep. Roberts), 97th Cong., 1st Sess.

[29]ETSI cites authorities which construed section 8 to apply the acreage limitations of the reclamation law to irrigation use of Army reservoirs despite the absence of Interior irrigation works. 41 Op. Att'y Gen. 377, 377-378, 395 (1958), ETSI Br., p. 22. *See also United States v. Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), *cert. denied* 429 U.S. 1121 (1977). That construction does not assist ETSI. The ETSI contract is not for irrigation purposes, and it is thus clearly outside the scope of section 8.

The Reclamation Reform Act was specifically intended to reject that construction. The Senate Committee report stated:

> It is the general intent of this section to eliminate the shadow of applicability of the reclamation law to

(Continued on following page)

a project which would be exempt from the reclamation laws under this test. 128 Cong. Rec. 16605-16606; 16607, Table I, n.3. In the absence of Interior works, Interior has no interest in how the water is used and has no reason to market the water.

A purpose of section 8 was to subject irrigators to the payment and acreage limitations of reclamation law. *See* Pet. App. 61a. *See also* remarks of Senator Wheeler, 90 Cong. Rec. 8314; and of Senator Murray, 90 Cong. Rec. 8622. In light of Congress' purpose, it had no reason to give Interior authority to market water in Army reservoirs for any uses other than irrigation.

Interior relies on agency letters transmitting the Pick and Sloan plans to claim that Army reservoirs should be operated under regulations of the Bureau of Reclamation so far as irrigation and power functions are concerned. *See* S. Doc. 191 at 11; Fed. Br., p. 27. Compare H.R. Doc. 475 at 7 (Commissioner of the Bureau of Reclamation: " . . . the Corps of Engineers would *advise*

(Continued from previous page)

> Corps of Engineers projects in any case in which the intent of Congress concerning such applicability is not clearly and explicitly set forth in statutory language.

S.Rep. 373, 97th Cong., 2d Sess. 16 (1982). *See also* 128 Cong. Rec. 16613 (Sen. Cochran).

and *consult* with the Bureau of Reclamation in the construction, operation, and maintenance of such features.") But, the District Court noted, "Although many people discussed the division of control over the main stem reservoirs, nobody said that the Bureau's level of control over certain water stored for irrigation in Corps-built dams was so complete that the Bureau could furnish that water for non-irrigation purposes—i.e., industrial or miscellaneous uses." Pet. App. 58a-59a.[30]

The recommendation of the Chief of Engineers that the Corps have authority to prescribe regulations governing flood control storage in all federally funded reservoirs, H.R. Doc. 475 at 3-4, was adopted by Congress in section 7 of the Act. The Chief's additional suggestion that Interior be granted authority to adopt regulations for use of irrigation storage at multiple-purpose reser-

---

[30]In *United States ex rel. Chapman v. Federal Power Commission*, 345 U.S. 153, 159-160 (1953), this Court rejected the argument that approval of the Roanoke Basin comprehensive plan report in section 10 of the Flood Control Act of 1944 established approval of comments of the Chief of Engineers that described projects should be constructed by the Secretary of War. This Court stated:

> In any event, we do not have a recommendation for public construction that is clearly an integral part of the plan, and the decisive question is not what this or that isolated statement in the report or the comments thereon imply but how Congress may fairly be said to have received and read the report in the light of the legislative practice in relation to such public works.

345 U.S. at 160. The cited comments in the transmittal letters do not address industrial use of the main stem reservoirs and they clearly do not override what Congress subsequently expressly determined in sections 6 and 8.

voirs was embodied in section 6 of the House bill.[31] However, section 8 of the Senate bill, providing for Interior operation of separate irrigation works, was adopted instead.[32] There is a striking difference between the House version and section 8 as enacted—" . . . the former allows regulations about storage; the latter permits construction and operation of irrigation works which are added to a Corps-operated reservoir. The focus shifts from water in the reservoir to water that has been removed from the reservoir." Pet. App. 60a-61a. As a result, Army has adopted regulations governing flood control storage at

---

[31]Section 6 of the House bill, which was not enacted, provided:

> Hereafter, whenever in the opinion of the Secretary of War and the Chief of Engineers any dam and reservoir project operated under the direction of the Secretary of War can be consistently used for reclamation of arid lands, *it shall be the duty of the Secretary of the Interior to prescribe regulations under existing reclamation law for the use of the storage available for such purpose,* and the operation of any such project shall be in accordance with such regulations. Such rates, as the Secretary of the Interior may deem reasonable, shall be charged for the use of said storage; the moneys received to be deposited into the Treasury to the credit of miscellaneous receipts: * * *

(emphasis added). H.R. 4485 Senate Hearings at 2; H.R. Rep. 2051, 78th Cong., 2d Sess. 2, 7 (1944); 90 Cong. Rec. 9260 (1944) (amendment no. 17).

[32]ETSI and the federal defendants state that the Secretary of the Interior described the changes between the House version and section 8 as "technical." ETSI Br. at 40; Fed. Br. at 48, n.71. What Secretary Ickes actually said was that the provisions of section 6 of the House bill were "not entirely apt in their relation to the various technical features of the Federal reclamation laws." H.R. 4485 Senate Hearings at 313. See Pet. App. 60a. In other words, the concept of Interior regulatory authority over storage embodied in section 6 did not fit with the reclamation law. See also H.R. 4485 Senate Hearings at 458.

reclamation reservoirs, 33 C.F.R. § 208.11, but Interior has not adopted regulations for irrigation storage at Army reservoirs. Pet. App. 61a.

Defendants' arguments primarily rely on statements of legislators suggesting that Interior would exercise authority over irrigation features. *See* Fed. Br. p. 33, n.52; ETSI Br., p. 17. This legislative history predates the conference report in which section 8 of the Senate bill replaced section 6 of the House bill which embodied those views."[33] The legislative history of a bill that was not adopted cannot be resorted to to construe a bill that was. Congress does not intend a result that it expressly declines to enact. *Gulf Oil Corp. v. Copp Paving Company, Inc.*, 419 U.S. 186, 200 (1974). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. —, 107 S.Ct. 1207, 1219 (1987), quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-393 (1980) (Stewart, J., dissenting).

---

[33]The Senate Conference Committee Report regarding section 6 was delivered on Dec. 12, 1944. 90 Cong. Rec. 9259. The legislative history relied upon by the federal petitioners predate that report. Fed. Br., pp. 25-26, n.42, 43; p. 33, n.52. Their brief quotes statements only from the House debate. Contrary to their suggestion, Senator Overton merely stated that Interior would control irrigation use and operation of irrigation works, and not irrigation storage. 90 Cong. Rec. 8625.

The Solicitor General argues here that section 8 does not apply to the main stem reservoirs.[34] Fed. Br., p. 26, n.43; pp. 28-29, n.45. However, in 1981 the Commissioner of the Bureau of Reclamation stated:[35]

> . . . we have not, as of this date, required contracts for private irrigation diversions from Corps' reservoirs on the mainstem of the Columbia and Missouri Rivers; however, Reclamation law does apply to those projects based on Section 8 of the Flood Control Act of 1944.

ETSI's argument that section 8 does not apply to projects authorized in the Act is also inconsistent with the position of the United States in *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), and

---

[34]The Government's brief in the Court of Appeals asserted, in contrast, that section 8 applied the reclamation law to "all Corps projects which include storage for irrigation," citing the 1958 Attorney General's opinion, 41 Op. Att'y Gen. 377. Ct. App. Br. of Federal Defendants, p. 7. The Government's brief specifically stated " . . . the rationale of the OAG applies to projects authorized by either Section [9 or 10] of the 1944 law." *Id.*, p. 36, n.18.

[35]Letter from Commissioner of the Bureau of Reclamation, Robert N. Broadbent, to Senator Henry M. Jackson, Hearings before the U.S. Senate Committee on Energy and Natural Resources (97th Cong., 1st and 2d Sess.) on S. 1867, p. 565. S. 1867 was ultimately adopted as the Reclamation Reform Act of 1982, P.L. 97-293. See pp. 23-24, supra.

In 1970 the Department also cited section 8 as the statutory authority for applying reclamation law to the main stem reservoirs during a controversy concerning whether private irrigation diverters should be required to pay water service charges. The Department ultimately determined that reclamation law would not apply to irrigation use which was not dependent upon the reservoir storage. 128 Cong. Rec. 16607-16608; Guhin, *The Law of the Missouri*, 30 S.D. L.Rev. 347, 482-485 (1985).

in 41 Op. Att'y Gen. 377, 394-395, which applied section 8 to projects authorized in section 10 of the 1944 Act.[36]

Congress defined the authority of the Secretary of the Interior at Army reservoirs in section 8 of the Act. ETSI's use is not for irrigation purposes and would not be provided through Interior works. The ETSI contract is therefore clearly outside the limited scope of authority granted the Secretary of the Interior in section 8.

C. Section 9(c) of the Act Simply Applies Reclamation Law to Reclamation Developments to be Undertaken by the Secretary of the Interior under the General Comprehensive Plans for the Missouri River.

The authority relied upon by the agency to market Oahe water for industrial use is section 9(c) of the 1944 Flood Control Act, which allegedly "incorporates" section 9(c) of the Reclamation Projects Act of 1939, 43 U.S.C. § 485h(c). 1975 Hearings, p. 53; ETSI App. pp. 113a, 114a; Memorandum of the Solicitor, J.A. 120; Pet. App. 53a-54a.

Section 9(c) of the Flood Control Act applies reclamation law only to the "reclamation and power developments to be undertaken by the Secretary of the Interior" under the plans approved in section 9(a). The District Court

---

[36]The language of section 8 also refutes ETSI's argument. Section 8 states that Army reservoirs "may be *utilized hereafter* for irrigation purposes only in conformity with the provisions of this section . . . *Provided*, That this section shall not apply to any dam or reservoir *heretofore constructed* . . ." (emphasis added). (This proviso was added to prevent section 8 from affecting on-going litigation involving an already constructed reservoir. 90 Cong. Rec. 8552-8553.)

and the Court of Appeals correctly held that Lake Oahe is not a reclamation development to be undertaken by the Secretary of the Interior ~~under~~ those plans. Pet. App. 17a-19a, 54a. Defendants do not attempt to establish that that finding is clearly erroneous or contrary to law. Instead ETSI criticizes the Court of Appeals for "focusing its analysis" on the controlling language in section 9(c), ETSI Br., p. 28, and Interior argues that whether Oahe fits within that language " . . . is the wrong question." Fed. Br., p. 31.

The Solicitor General now basically argues that section 9(c) simply identifies the source of law which applies to whatever Interior does in the Missouri River basin. Fed. Br., pp. 32-33. The term "development," the Solicitor General asserts, could be construed so broadly that the Secretary's execution of a water service contract is itself a "reclamation development."[37] Fed. Br., pp. 32-33. However, the Sloan Plan uses the term "development," and especially the phrase "power developments," to describe physical works. S. Doc. 191 at 16, 124, 136. Further, if the ETSI contract is a "development," it is not a "*reclam-*

---

[37]Counsel's attempt to explain how section 9(c) might be construed to include the ETSI water service contract is not entitled to deference as an agency position. "It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress." *Securities Industry Assn. v. Board of Governors of the Federal Reserve System*, 468 U.S. 137, 143-144 (1984) quoting *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971).

ation development."[38] Finally, there is nothing to show that industrial use of Oahe was to be undertaken by the Secretary of the Interior under the Pick and Sloan Plans. Pet. App. 32a. The Solicitor's argument simply begs the question of authority.

ETSI argues that the "irrigation storage" at Oahe should be considered a reclamation development. ETSI Br., p. 31. The District Court found that there is no defined irrigation storage at Oahe.[39] Pet. App. 57a, 63a-64a. Instead the storage allocation at Oahe is divided into inactive storage, flood control, "annual flood space and multiple use," and "carry-over multiple use." Pet. App. 57a.

---

[38]Secretary Ickes' contemporaneous construction was that industrial uses do not involve reclamation. H.R. 4485 Senate Hearings at 313. The term "reclamation" is used throughout the reclamation laws to refer to the reclamation of arid land—i.e., irrigation. *See*, e.g., 43 U.S.C. § 391 (reclamation fund to be used for "irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands . . ."). Just because the Secretary has a power at reclamation reservoirs does not make the exercise of that power a reclamation development. *See, e.g.*, 43 U.S.C. § 387 (power to grant easements in lands).

[39]Rather than providing any definition of this "irrigation storage," ETSI cites basin-wide figures showing that Interior's Sloan Report anticipated that more than seventy-five percent of the benefits from the overall plan would be from irrigation. *Id.* As the District Court noted, these basin-wide figures include the many reclamation reservoirs on the tributaries. Pet. App. 57a. ETSI also claims that only one-third of the storage planned for the main stem reservoirs was required for flood control and navigation, and that irrigation represented the largest single use of storage (ETSI Br., p. 31, n.23). The Senate hearings cited by ETSI show these figures to be false. Col. Reber repeatedly insisted that 10,000,000 acre-feet was a bare minimum necessary for navigation and that irrigation is not the largest use of water from main stem reservoirs. H.R. 4485 Senate Hearings, pp. 731-734.

The multiple-use storage lumps navigation, power, and irrigation storage together. *Id.* Col. Reber, Chief of Engineers, testified that water for navigation, power production, and irrigation would all be included within multiple-use storage; there would not be separate storage allocations. H.R. 4485 Senate Hearings at 729. Pet. App. 63a. Actual practice at Oahe and the other main stem reservoirs confirms this. Pet. App. 64a.

Congress did not contemplate shared jurisdiction over these reservoirs; instead, it conferred control over each reservoir on the agency which constructed it. Senator O'Mahoney stated:

> • • • [I]t was the purpose to give to the [Department of the Army] jurisdiction over [Army] dams and improvements, and to the Bureau of Reclamation jurisdiction over those which were primarily to be used for reclamation • • • .

90 Cong. Rec. 8548 (1944), quoted in Pet. App. p. 22a, n.13. As Senator Overton, Senate floor manager of H.R. 4485, declared, "[*s*]*omeone must have control of a dam. If it is a flood-control or navigation dam, the Secretary of War has charge of it,* and if it is an irrigation dam, the Secretary of the Interior has charge of it." 90 Cong. Rec. 8315 (1944) (emphasis added). Pet. App. 59a.

It is apparent that Oahe is a project undertaken by Army under sections 9(a) and 9(b) of the Act, and not a reclamation development to be undertaken by the Secretary of the Interior under sections 9(a) and 9(c). Section 9 thus affirms that Army not Interior, exercises the powers of the federal government with regard to industrial use of water stored at Lake Oahe.

D. Congress has the Authority to Modify the Act, and the Secretary of the Interior Should not be Permitted to Arrogate that Power.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. —, 105 S.Ct. 658, 662 (1985). *See also Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. —, 107 S.Ct. 1207, 1213 (1987).

Defendants ignore the language of the Act and replace it with their notion of the legislative intent as derived from snippets of legislative history. This is clearly improper. If the statutory language is clear, it must be given effect, at least in the absence of a patent absurdity. *Id.* at 1223, 1224 (Scalia, J., concurring). *United States v. James*, 478 U.S. —, 106 S.Ct. 3116, 3122 (1986).

In addition, defendants improperly attempt to imply an exception to the clear language of section 6. The *amici* argue that section 9 is an "act within an act." *Amici* Br., p. 10, n.6. Under their theory sections 6 and 9 of the Act apply to the Missouri River Basin while sections 6 and 8 only "tangentially apply." They read section 9 as excepting the Missouri River Basin from sections 6 and 8.

Whether an exception should be created is a question for legislative judgment, not judicial inference. It is clear that Congressmen assumed that the substantive provisions which they were debating would apply on the Missouri River. *See, e.g.*, 90 Cong. Rec. 8548 (1944) (Sen.

O'Mahoney). No one said that section 9 would except the Missouri River Basin from other provisions of the Act.[40] In dialogue after presentation of the conference report, Rep. Whittington specifically states that section 5 would apply to the Missouri River.[41] 90 Cong. Rec. 9282. Pet. App. 67a, n.3.

Where possible, the provisions of a statute must also be read so as not to create a conflict. *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. —, 106 S.Ct. 1890, 1899 (1986). Interior's construction of section 9(c) conflicts with both sections 6 and 8. It is obviously incongruous to construe the statute so that two agencies market the same water for industrial use while applying differing criteria and conditions. See Pet. App. 31a.

Interior argues that the revenues from industrial water contracts should be credited as reclamation receipts.

---

[40]The Attorney General opined in 1958 that section 8 of this Act governed projects authorized in section 10 despite any inconsistent implications from the proposing reports. 41 Op. Att'y Gen. 377, 394-395. Section 10, the Attorney General stated, resolved the issue of which agency would construct the reservoirs in question. " . . . the question of the applicability from the reclamation laws was largely discussed in connection with section 8 as it evolved." 41 Op. Att'y Gen. at 395. The same rationale requires application of the substantive provisions of the Act, here sections 6 and 8, over claimed implications to the contrary based upon section 9.

[41]Interior took the position in 1957 hearings that section 9(c) rather than section 5 governed Missouri River power marketing. Missouri Basin Water Problems: Joint Hearings Before the Senate Committee on Interior and Insular Affairs and the Senate Committee on Public Works, 85th Cong., 1st Sess. 319 (1957) [hereinafter 1957 Hearings]. The opposite position was taken by the Assistant Chief Counsel for the Bureau of Reclamation in 1946 (1957 Hearings at 390) and the Interior Solicitor in

(Continued on following page)

This argument does not assist in divining the intent of the 1944 Congress because Interior, as late as 1957, construed the reclamation laws as not permitting payment into the reclamation fund of revenues from power generated at the Army power plants on the Missouri River.[42] 1957 Hearings at 319.

(Continued from previous page)

1950 (1957 Hearings at 369). Both concluded that section 9(c) referred only to the power developments constructed by Interior. In 1958 Congress specifically referenced section 5 in a bill concerning Missouri River Basin projects. Act of July 3, 1958, 72 Stat. 297, 311. Interior's inconsistent constructions of the effect of section 9(c) on power, which it specifically addresses, does not assist in implying authority over industrial use from section 9(c). See n.42 *infra*.

[42]The relevant reclamation law, 43 U.S.C. § 392a, provides, "[a]ll monies received by the United States in connection with any irrigation projects, including the incidental power features thereof, constructed by the Secretary of the Interior through the Bureau of Reclamation . . . shall be covered into the reclamation fund . . ."

The Department of the Interior construed this statute as not authorizing deposit of receipts from power generated at the "Corps developments" on the Missouri River into the reclamation fund. 1957 Hearings at 319, 323-24. Interior was expressly granted a power marketing function under section 9 of the Flood Control Act. Interior constructed extensive transmission facilities for this power, and the beginning clause of section 9(c) creates special exceptions to the general reclamation laws for benefits, allocation of costs, and repayments by water users. Interior could nonetheless find no authority to deposit the power revenues in the reclamation fund. 1957 Hearings at 318-319, 323-324, 329-330. Instead the Department Assistant Solicitor, Mr. Weinberg, explained " . . . in the absence of a provision in the reclamation law dealing with the deposit of revenues from projects not constructed by the Secretary of the Interior, they must, under general principles of law, be deposited in the general fund of the Treasury." 1957 Hearings at 319. Thus, under either section 9(c) or section 6, revenues from industrial contracts would presumably go into the general fund.

The treatment of power revenues has apparently been separately resolved, and that is not an issue in this case.

ETSI's petition for certiorari, at p. 19, stated that the decision below "leaves water stored for irrigation in main stem reservoirs unavailable for any new consumptive use even if this results in a decrease of power production."[43] The Army General Counsel has, however, recently opined that water in the main stem reservoirs can be marketed for industrial use.[44] Section 6, the General Counsel opined, permits "reasonable reallocations between the different project purposes." *Id.* The General Counsel concluded that the Secretary could provide municipal water supply from a reservoir at which contemplated irrigation use had not occurred so long as this would not "unreasonably impair the efficiency of the reservoir's other purposes." States' App. 18a. The plaintiff States are concerned that Army not ignore other uses. It is not, how-

---

[43]By contrast, the federal defendants' Petition for a Writ of Certiorari, p. 12, n.13, stated, "This case does not raise any question concerning the Department of the Army's authority to manage water within the mainstem reservoirs."

[44]Memorandum from Susan J. Crawford, General Counsel, Department of the Army, to the Assistant Secretary of the Army (Civil Works), *Proposed Contracts for Municipal and Industrial Water Withdrawals from Mainstem Reservoirs* (Mar. 13, 1986) (cited in Fed. Br., p. 39, n.58). States' App. 12a.

The Army General Counsel opinion, rendered the same day as the decision below, was first brought to the attention of this Court and the parties in the federal defendants' brief on the merits, p. 38, n.58. It is appropriate for the parties to inform the Court of this development. *See Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J. concurring); *Board of License Commissioners of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam).

The Army General Counsel's opinion of section 6 is highly significant as their differing construction of section 6 was the "essential difference" between the majority and the dissenting opinion below, Pet. App. 1a-44a. This was also a primary reason presented by ETSI in its petition for a writ of certiorari. ETSI Petition, pp. 19-21.

ever, appropriate to interpret a statute clearly administered by Army in a manner inconsistent with Army's interpretation in order to assert that deference should be given to Interior's assertion of implied competing authority.

Army previously construed "surplus water" as "water trapped or stored in a reservoir project which is not utilized to fulfill an authorized project purpose." *See* J.A. 209-210, ¶ 7.3(c). If the waters were in fact "unutilized," the water would be available for industrial use under that interpretation.

Any statutory limitations on Army's industrial water marketing reflect Congress' choice concerning industrial diversions from Army reservoirs. The Department of the Interior has no authority to "correct flaws that it perceives" in a statute administered by Army. *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. —, 106 S.Ct. 681, 688-689 (1986).

The dissent below construed section 6 as giving Army jurisdiction only over surplus waters and concluded that no agency would have jurisdiction over "irrigation waters." Army clearly has the authority to manage the reservoir, as the federal defendants recognize. *See* Federal Defendants' Pet. for Cert., p. 4, n.2 and Fed. Reply Br. on Pet. for Cert., pp. 3-5. Army was given the authority to market surplus water as a power incidental to the authority to operate the dams. *See United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53, 72-73 (1913) (authority of Secretary of War to market surplus water power justified as incidental to navigation).

The Corps operates the reservoir and must have the authority to determine what water is surplus to its needs.

The *amici* argue that section 6 gives the Army authority over only that water which is surplus to the needs of flood control and navigation.[45] *Amici* Br., p. 18. Ignoring the fact that water in multiple-use storage is also used to supply navigation, the *amici* contend that the Bureau has authority to contract for all of the waters in multiple-use storage. *Amici* Br., p. 19, n.11. This argument is squarely contrary to Congress' determination that Army, not Interior, should control the main stem reservoirs because their primary function is flood control and navigation.

The *amici* argue that Interior should market this water because of its allegedly greater respect for state water rights.[46] Army requires that industrial users acquire state water rights, J.A. 207, and section 6 protects uses perfected by state law. Interior, by contrast, asserted in this very case that cancellation of ETSI's state permit would not preclude performance of the federal water service contract. *See* n.62, *infra*.

---

[45]*Amici* cite the testimony of Clifford Stone. *Amici* Br. 31. Mr. Stone, however, testified that section 6 [then section 4] would govern "use other than irrigation" and that whether surplus water was available would be entirely determined by the Secretary of War. H.R. 4485 Senate Hearings at 561.

[46]The legislative history cited by federal defendants to demonstrate concern over proposed Corps' water marketing authority relates to section 4 of the House bill. *See* Fed. Br. at 8. The Senate added the proviso protecting existing uses to allay these concerns. *See* 90 Cong. Rec. 9279.

The implied authority for which defendants contend is unnecessary to further the purposes of the Act. Congress had no reason to give the Bureau authority to market water in Corps reservoirs for any uses other than irrigation. Certainly, implication of Interior authority to market water for industrial uses is not necessary to protect its legitimate interest in its irrigation functions, because the Corps' water marketing authority depends upon a prior determination that such water is "surplus" and not needed by the Bureau for irrigation.

The clear policy of Congress in recent years has been to reduce, not augment, the Bureau's authority at Army reservoirs. Interior's power marketing function was taken away in 1977 (Department of Energy Organization Act, 42 U.S.C. § 7152(a)(3)), and the Reclamation Reform Act of 1982, 43 U.S.C. § 390*ll*(a), limits the applicability of reclamation laws to irrigation use absent explicit statutory language or irrigation works. And, consistent with section 8's requirement of Congressional approval for Interior's irrigation works, Congress has required Congressional approval for modifications of reservoir projects and project purposes (Water Supply Act of 1958, 43 U.S.C. § 390b; for construction of any previously authorized Missouri Basin projects (P.L. 88-442, 78 Stat. 446 (1964)); and for any change of cost allocations in the Missouri River Basin (42 U.S.C. § 7152(a)(3)).

ETSI has abandoned its project, J.A. 257-258, and Army is now considering applications for contracts under section 6. States' App. 12a. Leaving Interior to a Congressional remedy would not cause significant harm. By avoiding the protections of section 6, Interior's assumption of this power, by contrast, leaves other uses of the main stem

reservoirs without any protection. If needed, Congress can balance the various interests at stake and fashion a remedy which this Court could not. Pet. App. 32a. *See Board of Governors*, 106 S.Ct. at 689 n.7.

II. CONGRESS DID NOT GIVE THE SECRETARY OF THE INTERIOR AUTHORITY TO OVERRIDE THE TERMS OF SECTION 6 AND EXPAND THE SCOPE OF HIS AUTHORITY AT ARMY RESERVOIRS.

"The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

An administrative agency has only that power delegated to it by Congress. "An agency may not confer upon itself power. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. —, 106 S.Ct. 1890, 1901-1902 (1986).

Congress directly addressed the precise question of industrial water marketing at Army reservoirs in section 6 of the Act. It also addressed the role of the Secretary of the Interior at Army reservoirs in section 8 of the Act. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect

to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. An administrative interpretation of a statute "cannot supersede the language chosen by Congress." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). "An agency literally has no power to act, . . . unless and until Congress confers power upon it." *Louisiana Public Service Commission*, 106 S.Ct. at 1901. The Department of the Interior has no authority to correct flaws which it perceives in the Flood Control Act. *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. —, 106 S.Ct. 681, 688-689 (1986).

The 1944 Flood Control Act addresses who will market water for industrial use at Oahe. Congress did not leave that issue for the Secretary of the Interior to determine.

Deference does not apply to a pure question of law where the Congressional intent can be determined by traditional rules of statutory construction. *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. —, 107 S.Ct. 1207, 1220-1221 (1987). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. *See also Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960).

Deference assumes a reasonable and adequately articulated agency construction. The administrative record for the ETSI contract shows that the agency here brushed aside all issues of statutory authority by simply citing

a 1974 unpublished memorandum from the Solicitor.[47] Pet. App. 32a-34a; 68a-69a. That legal opinion is clearly flawed. Pet. App. 34a n.25. The Solicitor's memorandum does not even mention the contrary grant of authority to Army in section 6, the rejection by Congress of amendments to confer industrial marketing authority on Interior, or the revision of section 8 to delete the proposed Interior authority to promulgate regulations for irrigation storage. Courts must set aside agency actions based on an erroneous legal foundation. *N.L.R.B. v. Brown*, 380 U.S. 278, 292 (1965).

It was unreasonable of the agency to refuse to examine the authority issue anew. Significantly, Interior did not assert unilateral marketing authority in 1974 on the basis of the Solicitor's advice. It instead executed the MOU with Army, an indication that the Department lacked confidence in the claim of unilateral authority. *See* Pet. App. 68a. Interior and Army both characterized the MOU as an interim measure while a permanent solu-

---

[47]The record illustrates that the agency decisionmaker was not informed of the question decided in this case. Thus deference would be given to those lower level employees who summarily rejected the plaintiff States' extensive arguments on this issue (A.R. 900,287, States' App. 21a and failed to bring these issues to the attention of the Secretary.

The Solicitor's opinion of November 27, 1974 (J.A. 120) was the basis for claimed authority in the memorandum approving the ETSI contract (J.A. 212); the Bureau of Reclamation summary of public comments (A.R. 900,287, States' App. 21a, and the November 5, 1980, memo setting forth procedures for the marketing program (J.A. 147).

tion was sought.[48] 1975 Hearings at 23, 31. By 1982, the agency had had seven years to seek Congressional authorization, and Congress had further limited Interior's authority at Army reservoirs. *See* p. 39, *supra*.

Deference to Interior's assertion of this authority would be absurd because equal deference would have to

---

[48]Defendants argue that the 1975 hearings show that Congress was aware of Interior's claim of unilateral marketing authority. It cannot be assumed that the committee's failure to take action on a temporary, two-year agreement premised on the joint authority of Army and Interior constituted authorization for Interior to unilaterally market water after expiration of the MOU. *See Securities and Exchange Commission v. Sloan*, 436 U.S. 103, 120-122 (1978). There is no evidence that the committee approved the MOU or that its position either reflected the position of Congress as a whole or resulted from considered review of the particular question of Interior's *unilateral* authority. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 191-192 (1978). *See* Pet. App. 35a.

The defendants also cite a 1955 Senate report as indicating that Interior was responsible for space reserved for irrigation in any dam in the Missouri River Basin. S.Rep. 1066, 84th Cong., 1st Sess. 3 (1955). Fed. Br., pp. 48-49, n.72. The scope of Interior's authority at Army reservoirs was not an issue in the report.

The federal defendants suggest that Bureau and Corps letters to Senator Moynihan during the debate on the Reclamation Reform Act of 1982 "fully informed" Congress of the Secretary's unilateral marketing program. Fed. Br., p. 48 (text and n.72). The Bureau's letter nowhere mentions industrial use and appears directed to contracts for "irrigation water service." 128 Cong. Rec. 16607. The Corps letter indicates that there have been sales of water for industrial use from the main stem reservoirs, 128 Cong. Rec. 16611, but it does not indicate by what agency or authority this was done.

Section 212(b) of the 1982 Act, 43 U.S.C. § 390*ll*(b), provides that obligations, pursuant to contracts with Interior, to repay the share of costs allocated to irrigation storage "shall remain in effect." This section simply "preserved existing repayment requirements at Corps constructed dams." *See* Fed. Br. p. 48, n.72.

be given to the Army Counsel's view that Interior lacked independent authority for industrial water marketing.[49] Pet. App. 34a, n. 25, 69a. The Secretary attempts to avoid this problem by hinting that Army and Interior have resolved this matter and that "Army considers acceptable" the Secretary of the Interior's interpretation. (Fed. Br., p. 46). Whatever the litigation position of the Justice Department, the documents in the administrative record do not show concurrence.[50] To the contrary, the General Counsel for Army concluded, " . . . the Secretary of the Interior may not market the water from these reservoirs independently." J.A. 135. The Secretary of the Army expressed concern about the legality of even joint marketing under the MOU. J.A. 142. In 1978 Army refused to extend the MOU for that reason. J.A. 143-144. The Court of Appeals specifically found that Army did not approve the ETSI contract. (Pet. App. 15a-17a).

---

[49]This Court has given deference to an Army interpretation of a statute it was charged with enforcing. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. —, 106 S.Ct. 455 (1985).

[50]The federal defendants cannot properly assert that Army now finds Interior's assertion "acceptable." The federal defendants refused to certify a record which would include Army actions concerning the ETSI contract or the marketing program. J.A. 14-18, Docket Nos. 152, 184, 196. (Documents obtained in discovery show that the Army Assistant General Counsel for Legislation and General Law stated that Army and not Interior had marketing authority for Lake Oahe. C.A. App. 352-353.) The Corps Division Engineer who granted the ETSI construction permits refused to consider the issues plaintiffs raised concerning the validity of the water service contract. J.A. 211. (Pet. App. 16a, n.8).

The Court of Appeals correctly concluded that the Secretary of the Interior's assertion of industrial marketing authority at Oahe was beyond his statutory mandate and not entitled to judicial deference. Pet. App. 33a-34a.

III. AMICI'S ARGUMENT IS IRRELEVANT TO THE ISSUE IN THIS CASE.

Amici argue that section 1(b) of the 1944 Flood Control Act allocated stored water in favor of the upstream States and that therefore Interior, rather than Army, must market the water. *Amici* cannot raise a new issue before this Court. *United Parcel Service v. Mitchell*, 451 U.S. 56, 60, n.2 (1981). The only substantive question resolved below is whether the Secretary of the Interior can claim authority under reclamation law to market water at Oahe for industrial use.[51] Section 1(b) does not resolve that question.[52] This Court should not decide the extraordinary

---

[51]According to an article written by an Assistant Attorney General of South Dakota, South Dakota officials in 1969 took the position that section 9(c) of the Reclamation Project Act of 1939 was not applicable to main stem reservoirs because they had not been built by the Secretary of Interior, and had not been built for irrigation. Guhin, *Law of the Missouri*, 30 S.D. L.Rev. 346, 484. They now urge inconsistently that this Court apply that law at Oahe, *Amici* Br., p. 43. At any event, it is clear that this is not a States' rights issue.

[52]Indeed the sponsor of section 1(b), Senator O'Mahoney, proposed an amendment that would have authorized Army to market water for all purposes including irrigation, from Army reservoirs. 90 Cong. Rec. 8548. *See also* Pet. App. 34a, n.25.

question whether Congress allocated the waters of the Missouri River in this judicial review proceeding.[53]

The plain purpose of legislation is determined from the plain language of the statute itself.[54] *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 106 S.Ct. 681, 688-89 (1986). Section 6 of the Act specifically addresses industrial water marketing. *Amici* attempt to construct an interpretation, based wholly on legislative history, which is contrary to the language of the statute.

Section 1(b), however read, concerns only beneficial consumptive uses "in States lying wholly or partly west of the ninety-eighth meridian." ETSI would merely withdraw the water in South Dakota; the water would be pumped 276 miles to Wyoming to be injected into a pipeline to transport slurried coal to Arkansas, the site of use. ETSI EIS, pp. 1-60, A.R. 900,331, C.A. App. 387; Pet. App. 7a. The Wyoming State Engineer could grant a water permit to ETSI only if it met detailed requirements including a finding that the use "will not interfere with do-

---

[53]Not all of the States along this major river are before the Court. The United States agrees that the Flood Control Act of 1944 does not apportion the waters of the Missouri River. Br. of the United States as *Amicus Curiae*, No. 103 Orig., p. 9. The Flood Control Act contains no express appropriation provision and it is totally unlike the Boulder Canyon Project Act at issue in *Arizona v. California*, 373 U.S. 546 (1963). We would also refer the Court to the Brief of Defendants Missouri, Iowa and Nebraska in Opposition to Motion to File, No. 103 Orig.

[54]The Act forwards the policy of protection of local uses through requiring State review of new federal projects in sections 1(a) and (c) of the Act and by providing for the many tributary reservoirs built primarily for consumptive use.

mestic, municipal, stock watering or irrigation uses or *other existing beneficial uses within Wyoming.*" Wyo. Statutes § 41-3-115(d)(ii) (1987). The ETSI use was clearly not a beneficial use within either South Dakota or Wyoming.[55] Section 1(b) is not applicable to the facts of this case.[56]

Section 1(b) did not resolve an interstate controversy nor did it allocate stored waters at Oahe, as claimed by *amici*.[57] A fair reading of the legislative history shows that

---

[55]*Amici* States of North Dakota, Wyoming and Montana are parties to the Yellowstone River Compact, which prohibits transbasin diversions of water without unanimous consent of the signatory states. 65 Stat. 663, Article X. *See Intake Water Company v. Yellowstone River Compact*, 769 F.2d 568 (9th Cir. 1985), *cert. denied* 105 S.Ct. 316 (1986). *See also* Wyo. Stat. § 41-3-115 (1987) (requiring legislative approval for out-of-state water diversions); Mont. Codes Ann. §§ 85-2-311(3), 85-2-402(5) (imposing strict requirements on out-of-state uses of water).

[56]Among the remaining issues pending in the District Court is whether a transportation use or a transbasin diversion may be authorized at Oahe. It is ironic that the provisions of section 1(b) would be cited in favor of a coal slurry pipeline which is also a transportation use but one which is, unlike navigation, totally consumptive and exclusive.

[57]See 90 Cong. Rec. 8374 (Sen. Overton, "The other question was as to whether there was not an irreconcilable conflict between the lower Missouri Valley people and the upper Missouri Valley people. There is no irreconcilable conflict."). Governor Sharpe of South Dakota in 1944 testified before a Congressional committee that western states should not have unfettered right to appropriate all waters within their borders without regard to needs of downstream users. H.R. 4485 Senate Hearings at 482-483. Governor Sharpe clearly recognized the need for federal oversight of such an important interstate stream as the Missouri. *Id.*

the upstream states were concerned that the federal government, under recent Commerce Clause cases, could demand all of the waters of the tributaries to maintain the water level necessary for navigation and deprive them of water for in-state uses.[58] *See, e.g., Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1940). Section 1(b) is part of the general policy statement of section 1, and should not be read to override later, more specific sections of the Act. It does not purpot to delineate authority between Army and Interior over stored waters.[59]

This case does not involve irrigation, and would not affect *amici's* irrigation use, or Interior's authority to use water for irrigation.[60] The plaintiff states have not challenged the upstream states' authority to issue water permits. South Dakota agreed that ETSI's use of stored

---

[58]90 Cong. Rec. 4139 (Rep. Troutman); 90 Cong. Rec. 4216 (Rep. Sullivan).

[59]*Amici* concede that Army "may have a different view" of the effect of section 1(b) on the withdrawal of stored waters from federal reservoirs. *Amici* Br., p. 14, n.9. *Amici* do not provide Army's interpretation, which of course should be considered in resolving the effect of section 1(b) on a reservoir under Army's primary jurisdiction.

[60]*Amici* claim, without citation of authority, that irrigation and reclamation uses include industrial use. *Amici* Br., p. 32. Secretary of Interior Ickes recognized these uses are distinct. H.R. 4485 Senate Hearings at 312; see *also* 90 Cong. Rec. 4197 (Rep. Whittington).

waters would require federal approval,[61] and ETSI no longer has a state permit. There is no case or controversy as to any issue of state authority,[62] and this case does not present an interstate dispute. The arguments of the *amici* should be rejected.

———o———

[61]Letter, Warren Neufeld, Sec'y, S.D. Dept. of Water & Natural Resources, Feb. 9, 1981, C.A. App. 212; Agreement for South Dakota Conservancy District to Assign a Water Right to Energy Industry Use to ETSI Pipeline Project, J.A. 152.

[62]The State of South Dakota originally sought to intervene in the case below. J.A. 4, Docket No. 10. On January 13, 1983, the Magistrate denied South Dakota's motion to intervene, holding that this case did not challenge South Dakota's water rights or authority, but only the actions of federal officials. J.A. 6, Docket No. 51. One month later, South Dakota withdrew its motion to intervene and its appeal of that decision and successfully requested leave to appear as *amicus curiae*. J.A. 7, Docket Nos. 64, 65.

Later both South Dakota and the Bureau of Reclamation argued that cancellation of ETSI's state permit would not preclude performance of the federal water service contract. Fed. Defendants Reply Br. [on Mootness], Ct. App., Apr. 1, 1985, pp. 9-12; Letter from Doyle, Asst. S.D. Att'y Gen., to Gans, Deputy Clerk, U.S. Ct. of Appeals, Apr. 15, 1985.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

STATE OF MISSOURI
WILLIAM L. WEBSTER
Attorney General
CURTIS F. THOMPSON
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
Tel. (314) 751-3321

STATE OF IOWA
THOMAS J. MILLER
Attorney General
ELIZABETH M. OSENBAUGH
Deputy Attorney General
ELIZA OVROM
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
Tel. (515) 281-5351

STATE OF NEBRASKA
ROBERT M. SPIRE
Attorney General
LE ROY W. SIEVERS
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Tel. (402) 471-2682

ADDENDUM

Flood Control Act of 1944, ch. 665, 58 Stat. 887, 887-898

AN ACT

Authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

In conformity with this policy:

(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investi-

gations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the

Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and pur-

poses incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9 (a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3 (a) of the Act of August 11, 1939 (53 Stat. 1418), as amended, are hereby amended accordingly.

SEC. 2. That the words "flood control" as used in section 1 of the Act of June 22, 1936, shall be construed to include channel and major drainage improvements, and that hereafter Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and water-flow retardation and soil-erosion prevention on watersheds shall be under the jurisdiction of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress.

SEC. 3. That section 3 of the Act approved June 22, 1936 (Public Numbered 738, Seventy-fourth Congress), as amended by section 2 of the Act approved June 28, 1938 (Public, Numbered 761, Seventy-fifth Congress), shall apply to all works authorized in this Act, except that for any channel improvement or channel rectification project provisions (a), (b), and (c) of section 3 of said Act of June 22, 1936, shall apply thereto, and except as otherwise provided by law: *Provided*, That the authorization for any flood-control project herein adopted requiring local cooperation shall expire five years from the date on which local interests are notified in writing by the War Department of the requirements of local cooperation, unless said interests shall within said time furnish assurances satisfactory to the Secretary of War that the required cooperation will be furnished.

SEC. 4. The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: *Provided*, That preference shall be given to Federal, State, or local governmental agencies, and licenses may be granted without monetary consideration, to such agencies for the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the public interest. The water areas of all such reservoirs shall be open to public use generally, with-

out charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be ap-

propriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided,* That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 7. Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations: *Provided,* That this section shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the Lower Ohio and Mississippi Rivers the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio

River in accordance with such instructions as may be issued by the War Department.

SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

SEC. 9. (a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Sev-

enty-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommenations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

(d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior.

SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided*, That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further*, That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further*, That penstocks and other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Depart-

ment when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.

* * *

(SEAL)

DEPARTMENT OF THE ARMY
Office of the General Counsel
Washington, DC 20310

13 March 1986

MEMORANDUM FOR THE ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)

SUBJECT: Proposed Contracts for Municipal and Industrial Water Withdrawals from Main Stem Missouri Reservoirs

This responds to your memorandum of 25 October 1985, requesting my views on the adequacy of two water withdrawal contracts. The contracts grant the city of Parshall, North Dakota (Parshall) and the North Dakota State Water Commission (NDSWC) privileges to withdraw water from Lake Sakakawea for municipal and industrial purposes.

Lake Sakakawea was formed by the waters of the Missouri River stored behind the Garrison dam. The Garrison dam is one of six Missouri main stem dams authorized by section 9(a) of the Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887. Pursuant to section 9(a), more commonly referred to as the Pick-Sloan Missouri River Basin Program, the six main stem dams are operated as a coordinated unit providing flood control protection, storage to enhance downstream navigation during prolonged droughts, hydropower storage, and storage of waters for irrigation.

The contracts provide that at a future date Parshall and NDSWC will agree to pay reasonable consideration

based upon benefits received. It is my understanding that the consideration will amount to a charge for reservoir storage needed to fulfill the withdrawal demands of Parshall and NDSWC. Parshall and NDSWC, as well as any future local users, will be charged only for storage that exceeds the amount of water that would have been provided by the natural flow of the Missouri River had the Pick-Sloan reservoirs not been constructed.

-2-

In my opinion section 6 of the Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887, *codified at* 33 U.S.C. § 708, authorizes your office to enter into the proposed contracts with Parshall and NDSWC. Section 6 provides that:

> The Secretary of the Army is authorized to make contracts with states, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army: *Provided,* That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

At issue in the Parshall and NDSWC contracts is whether surplus water exists in Lake Sakakawea. Certain legal opinions from the Corps of Engineers suggest that water in the main stem reservoirs would not be available for municipal or industrial purposes so long as the water is otherwise being used, or could be used, for the purposes specifically identified in the Pick-Sloan program. Under this analysis there is no surplus water in Lake Sakakawea

because all water not actually needed for irrigation or otherwise held within the reservoirs for navigation purposes, could eventually be discharged through the generators to produce hydroelectric power.

In my opinion, this interpretation of what constitutes surplus water is unnecessarily narrow. Under the authority of section 6 of the Flood Control Act, your office, acting for the Secretary of the Army, has broad discretion in marketing waters trapped in Corps of Engineers reservoirs. Congress made clear that section 6 of the Flood Control Act would give the Secretary of the Army authority equivalent to the authority of the Bureau of Reclamation pursuant to the Reclamation Projects Act of 1939, 43 U.S.C. § 485h(c).

-3-

During congressional debate over section 6 of the Flood Control Act of 1944, the House bill's sponsor explained the purpose of section 6 as follows:

> Section [6] provides that if there is a town or a city or a municipality that needs an additional water supply—and water is just as essential for human beings as it is for crops—the [Secretary of the Army] shall have the right to provide that that water shall be used there for the purpose of supplying the needs of man. It strikes me that the provision is a power that now obtains under the reclamation law. If it obtains under the reclamation law, I know of no good reason why it should not obtain in the existing bill.

90 Cong. Rec. 4125 (daily ed. May 8, 1944) (statement of Rep. Whittington). Later in the debate Congressman Whittington added the following:

> My recollection is that under the reclamation acts, and in the distribution of water under those acts, the Secretary of the Interior has the power to do in reclamation districts just what the [Secretary of the Army] would have power to do in reservoir districts. *This [section] is to make comparable the powers exercised by the Director of Reclamation and the [Secretary of the Army] and would apply only to waters that were surplus and not needed for irrigation or other purposes.*

Id. at 4134 (emphasis added).

Federal reclamation law grants the Secretary of the Interior broad discretion in marketing water stored in Bureau of Reclamation reservoirs and electric power produced at those reservoirs. Section 9(c) of the Reclamation Projects Act of 1939, P.L. 76-260, authorizes the Secretary of the Interior to enter into contracts for municipal water supply and the sale of electric power or lease of power privileges. 43 U.S.C.

§ 485h(c). This authority is limited by the requirement that "[n]o contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes." *Id.*

This provision has been interpreted to authorize the Secretary of the Interior to sell to municipal and industrial users water that was originally intended for use in irrigation but is not presently needed for that purpose. *See Environmental Defense Fund v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976) *reversed on other grounds Environmental Defense Fund v. Andrus*, 596 F.2d 848 (9th Cir. 1979); *see*

also State of Missouri v. Andrews, 586 F. Supp. 1268 (D. Neb. 1984); *Review of Federal Marketing Practices*, Decision of Comptroller General, Sep. 25, 1981, B-198376, B-198377, B-198378-O.M. (unpublished); *Clarification of Provisions of Water Supply Act of 1958 and the Reclamation Act of 1939*, Decision of Comptroller General, Nov. 14, 1979, B-157984-O.M.

In my opinion section 6 of the Flood Control Act gives the Secretary of the Army similar authority to market water stored in the Pick-Sloan flood control reservoirs. The Reclamation Projects Act authorizes the Secretary of Interior to reallocate and market water not needed to fulfill the paramount reclamation purpose of irrigation. Section 6 of the Flood Control Act provides the Secretary of the Army similar authority with regard to water he determines is not needed to fulfill a project purpose in Army reservoirs.

Courts have been deferential to the Secretary of Interior's determinations that the sale of water for municipal water supply does not impair the project's irrigation purpose. *Environmental Defense Fund v. Morton*, 420 F. Supp. at 1045. The legislative history of section 6 of the Flood Control Act implies that the Secretary of the Army's determinations with respect to water stored in Corps reservoirs are to be granted the same deference. In *United States v. 361.91 Acres of Land*, the district court held that:

> The function of carrying out the overall plan for the development of the Missouri

> River Basin has been delegated by Congress to the Department of [the Army] and Interior, and the Secretaries of those Departments have been vested with a wide discretion in carrying out such plan, and the courts have little or no authority to interfere with the exercise of that discretion.

Environmental Defense Fund v. Morton, 420 F. Supp. at 1043 *quoting United States v. 361.91 Acres of Land*, Civil No. 994 (D. Mont. 1965)

It is my understanding that none of the water stored in Lake Sakakawea is being withdrawn for irrigation purposes. Rather, discharges from Lake Sakakawea flow through the Garrison dam hydro-turbines to produce electricity. In my opinion the Secretary of the Army has the discretion to market water in Lake Sakakawea even if this results in a decrease of the project's actual or potential power production. Section 6 was included in the Flood Control Act to empower the Secretary of the Army to make reasonable reallocations between the different project purposes.

During congressional debate on Section 6, Congressman Whittington stated:

> It happens in many cases that there is a need, as the War Department has reported to the committee, for water for human consumption because of the drying up of wells. If that need occurs in Ohio, or if that need occurs in Massachusetts, or in any other State, instead of requiring the local people in the first instance where there is inability in many cases to issue bonds and to incur large indebtedness to share in the construction of that reservoir, the purpose of section [6] is to enable the Government, the Secretary of War, and the Chief of Engineers to make a disposition of water there for human consumption or for any proper in-

> dustrial use. . . . I submit Mr. Chairman, that if it be proper to provide for the storing of waters for reclamation to grow crops in the arid West,
>
> -6-
>
> with which I am in sympathy, it ought to be all the more in order to provide for the storing of waters for human consumption.

90 Cong. Rec. 4197 (daily ed. May 9, 1944) (statement of Rep. Whittington).

This indicates an intention to put water needs for other human uses on a par with water needs for irrigation. That, in turn, would give the Secretary authority to balance such needs against the need for water for other purposes, such as hydropower, specifically identified in the Pick-Sloan program.

In the case of Lake Sakakawea the argument for making water available for these other human uses is even stronger. It was originally intended that water from the reservoir would be used for irrigation, but none is being used for that purpose. That "unused" water, at least, surely can be considered surplus water within the meaning of section 6. Thus, section 6 gives the Secretary of the Army discretion to determine whether this water should be used to provide municipal water supply, at least to the extent that his decision does not unreasonably impair the efficiency of the reservoir's other purposes. Cf. 43 U.S.C. § 485h(c).

Although arguably not required by section 6 of the 1944 Flood Control Act, I suggest that the Department of the Army and the Department of Interior enter into a memorandum of understanding outlining plans for present

and future irrigation use of the Lake Sakakawea waters. This would facilitate a determination as to how much surplus water will be available for marketing. Documentation of the availability is desirable both for planning purposes and to ensure that the Army is not exceeding its section 6 authority.

Additionally, I suggest that the contracts be amended to incorporate the comments of Major General Hatch at paragraph 2d of his 16 October 1985 memorandum. Specifically, in order to make the draft contracts consistent with the form contract in ER 1105-2-20 Appendix B, the second WHEREAS clause should be modified to state that the contract is entered into under the authority of the 1944 Flood Control Act. Also, in the interest of minimizing any future dis-

putes, Article 5 should explain the intended compensation formula. Similarly, Articles 5 and 6 should explain that the water charge will not change over time except to reflect updated operation, maintenance, and replacement costs.

If we may be of any additional assistance in this matter, please do not hesitate to call.

/s/ Susan J. Crawford
Susan J. Crawford
General Counsel

UPPER MISSOURI REGION, BUREAU OF RECLAMATION SUMMARY OF STATEMENTS, LETTERS, AND RESOLUTIONS RECEIVED FROM PUBLIC ON PROPOSED WATER SERVICE CONTRACT BETWEEN ETSI AND THE UNITED STATES
(A.R. 900,287)

* * *

(9) State of Nebraska
Department of Justice
January 7, 1982, Letter

* * *

6. The irrigation of additional land in Nebraska will be required over the next 40 years and it is probable this will require Missouri River water.

Response—The plan for the Pick-Sloan Missouri Basin Program (P-SMBP) does not include the use of storage water from the Corps' Missouri River reservoirs for projects in Nebraska. All the future irrigation projects with storage cost assignments are in Montana, North Dakota, and South Dakota. A change in area of use could probably be made since water would likely be available. The proposed ETSI use should not impact such a determination.

* * *

8. Concerned that no surplus exists to provide up to 1 million acre-feet of water annually from Missouri River reservoirs until about 2035.

Response—Storage allocations to the future irrigation units of the P-SMBP in Montana, North Dakota, and South Dakota that are not scheduled for development until after 2025 would provide this surplus.

9. No consideration was given to the High Plains Study when the surplus was determined.

Response—The High Plains Study area has no call on storage from the P-SMBP main-stem reservoirs. The determination that the ETSI contract will not impair the efficiency of the project for irrigation is related only to the P-SMBP plan as it was authorized.

• • •

(11) Attorney General of Iowa
January 8, 1982, Letter

• • •

5. Questions the legality of the contract in detail.

Response—The November 27, 1974, opinion by the Solicitor concludes that the Secretary of the Interior does have authority to enter into industrial water service contracts. That opinion points out, "Where because of changed circumstances it is not feasible to market, within the time periods originally contemplated, the amount of water available from the reservoir capacity provided for irrigation and the probable extent of future irrigation, you have not only the authority but, in my opinion, the responsibility as well, to apply that water to another beneficial use, such as municipal and industrial purposes."

• • •

(12) Attorney General of Missouri
January 8, 1982, Letter

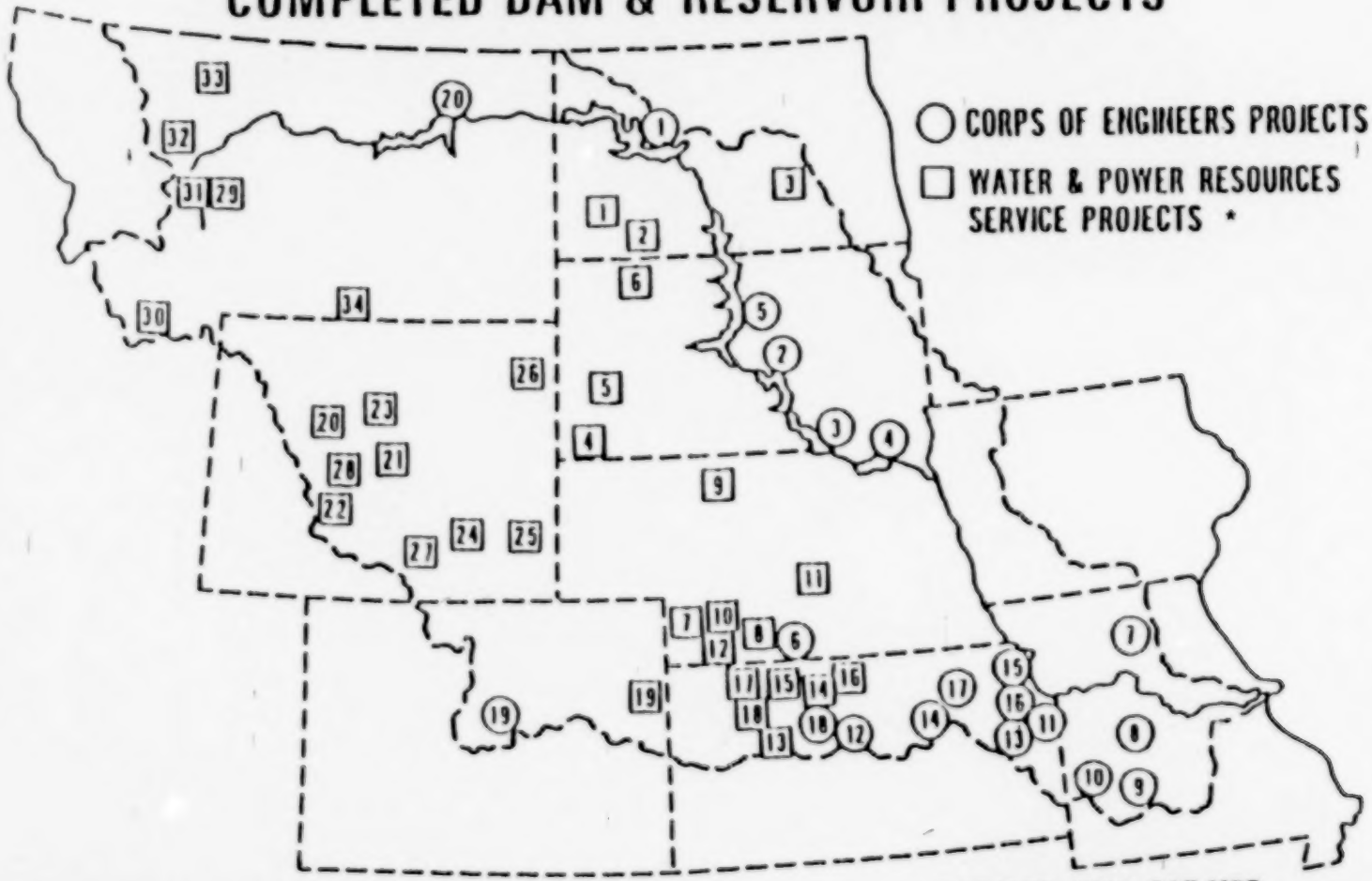
• • •

5. There are basic questions of the Federal Government's authority to execute the contract.

Response—The Secretary of the Interior's authority to market industrial water from surpluses available from future irrigation storage assignments was confirmed by Solicitor's opinion of November 27, 1974. This opinion concluded, in part, that the Secretary not only has the authority but the responsibility to market water for industrial use.

* * *

PICK-SLOAN MISSOURI BASIN PROGRAM
COMPLETED DAM & RESERVOIR PROJECTS



* Bureau of Reclamation